No. 09-1014

In the Supreme Court of the United States

ALEKSANDER STOLAJ, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1256(a)'s five-year limitation on the government's authority to rescind the grant of an adjustment to permanent resident status also precludes the initiation of removal proceedings based on fraud in the preceding grant of asylum.

2. Whether the court of appeals erred in affirming both the denial of petitioners' subpoena requests and the ultimate finding that petitioners had obtained asylum by fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B30) is reported at 577 F.3d 651. The decisions of the Board of Immigration Appeals (Pet. App. C1-C8) and of the immigration judge (Pet. App. D1-D40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2009. A petition for rehearing was denied on November 25, 2009 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1256(a) of Title 8 states:

> (a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. 1256(a).

Although Section 1256(a) was originally enacted in 1952, its last sentence was added by a 1996 amendment. See Immigration and Nationality Act (INA), ch. 477, § 246(a), 66 Stat. 217, amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 378(a), 110 Stat. 3009-649.[1]

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[1] In 2003, the Immigration and Naturalization Service ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116

b. The following regulation governs a party's application for a subpoena to compel the appearance of a witness to testify in removal proceedings before an immigration judge:

> (2) *Application for subpoena.* A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same.

8 C.F.R. 1003.35(b)(2).

2. Petitioners, husband and wife, are natives and citizens of Albania. They entered the United States as non-immigrant visitors in February 1996. Later that year, petitioners applied for asylum. Pet. App. B3, D2. With the assistance of a man named Luigji Berishaj, petitioners, though residing in Michigan at the time, provided a New York address, filed their asylum applications with the Vermont Service Center, and traveled to New York for the asylum interview. *Id.* at B4, B6.[2] Despite the interviewing officer's written assessment that the wife "has not shown any past persecution" and that her "fear of future persecution in Albania is not * * * well founded[]," her asylum application was granted (with derivative asylum for her husband) in February 1997. *Id.* at B4. On October 1, 1998, based on

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Stat. 2135. The text of 8 U.S.C. 1256(a), however, has not yet been amended to reflect that rescission authority now lies with the Secretary of DHS and not the Attorney General.

[2] The husband withdrew his asylum application on the day of the interview and requested that he be included on his wife's application. Pet. App. B3.

the grant of asylum, petitioners' status was adjusted to that of lawful permanent resident. *Ibid.* That adjustment was made retroactive to October 1, 1997. Administrative Record 1904 (A.R.).

During that time, John Shandorf was employed as a Supervisory Asylum Officer with the Immigration and Naturalization Service (INS) office in New York. Pet. App. B3-B4. Shandorf was later indicted and convicted for accepting bribes in return for approving asylum applications. *Id.* at B4-B5, B7; A.R. 1794. During Shandorf's criminal trial, Berishaj testified that he had arranged for Shandorf to grant asylum to petitioners (among others) and that he had paid Shandorf for his help with money obtained from petitioners. Pet. App. D28-D29.

3. On July 9, 2003, the Department of Homeland Security (DHS) served petitioners with Notices to Appear charging them with removability under 8 U.S.C. 1182(a)(6)(C)(i) for attempting to acquire an immigration benefit through fraud and under 8 U.S.C. 1182(a)(7)(A)(i)(I) for lacking a valid entry document. Pet. App. B6, C1-C2. DHS filed the notices in immigration court on November 1, 2003. *Id.* at D2-D3.[3]

During the course of removal proceedings, petitioners requested that the immigration judge (IJ) issue subpoenas to Berishaj and Shandorf, among others, to appear and testify. Pet. App. D5-D6. The IJ denied their requests because petitioners failed to comply with

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[3] Pursuant to 8 C.F.R. 1003.14(a), removal proceedings are commenced on the date of filing a Notice to Appear in immigration court. Accordingly, it appears that DHS commenced petitioners' removal proceedings exactly five years and one month after the date of their adjustment of status (or six years and one month from the retroactive date of adjustment).

8 C.F.R. 1003.35(b)(2)'s requirement that applicants establish their diligence in attempting to produce the requested witnesses. Pet. App. D6.

After a hearing on the merits, the IJ found by clear and convincing evidence that petitioners had been granted asylum through fraud and had no valid entry documents when their status was adjusted. Pet. App. D26-D39. He thus ordered them removed. *Id.* at D40. The IJ relied on Berishaj's testimony from Shandorf's trial stating that petitioners had received asylum due to Shandorf's improper interference. *Id.* at D27-D29. The IJ also relied on petitioners' own "implausible" testimony at the hearing—including the story that they had coincidentally run into Berishaj at a restaurant, where he offered to fill out the asylum applications on the spot and then disappeared—as well as inconsistencies with the wife's sister's testimony. *Id.* at D30-D31. The IJ further found that the government had proven that petitioners' "claimed New York residence was a misrepresentation provided to ensure that [petitioners] would be able to benefit from Berishaj's relationship with John Shandorf." *Id.* at D27.

4. The Board of Immigration Appeals (Board) adopted and affirmed the IJ's decision and dismissed the appeal. Pet. App. C1-C8. The Board first rejected petitioners' argument that the removal proceedings were barred because their asylee status had not been terminated and their lawful permanent resident status had not been rescinded within 8 U.S.C. 1256(a)'s five-year period. Pet. App. C2, C4 (citing *In re Smriko*, 23 I. & N. Dec. 836 (B.I.A. 2005), and *In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003)). The Board then found no adequate basis to disturb the finding that petitioners had obtained their asylee status through fraud and that

DHS had proven by "clear and convincing evidence" that petitioners were removable. *Id.* at C4-C6. The Board further rejected petitioners' assertion that they were denied a "full and fair hearing" because the IJ had denied their subpoena requests, observing that petitioners did not refute their failure to comply with the requirements for obtaining a subpoena under 8 C.F.R. 1003.35(b)(2). Pet. App. C7.

5. The court of appeals denied the petition for review. Pet. App. B1-B30.

As a threshold matter, the court held that the five-year imitations period on rescission proceedings under 8 U.S.C. 1256(a) does not apply to removal proceedings and that DHS therefore was not time-barred from initiating removal proceedings. Pet. App. B12-B18. The court explicitly rejected the Third Circuit's contrary view and embraced the conclusion reached by the other three circuits to have decided the question. *Id.* at B14. The court held that Section 1256(a), "[b]y its own terms," places a time limitation only on rescission and does not apply to removal proceedings—a conclusion supported by the 1996 amendment adding Section 1256(a)'s last sentence, which expressly disclaims a requirement to rescind status prior to commencement of removal proceedings. *Id.* at B15. To the extent any ambiguity remained, the court deferred to the agency's reasonable interpretation that Section 1256(a) "only limits the Attorney General's authority to rescind an adjustment of status" and thus "the lapse of more than five years since applicant's adjustment does not bar an exclusion proceeding based upon the alleged fraudulent procurement of an entry visa prior to his adjustment of status." *Id.* at B15-B16 (quoting *In re S-*, 9 I. & N. Dec. 548, 557 (Att'y Gen. 1962)). On a related issue, the court

agreed with the Board that petitioners were not immune from removal simply because their asylee status had not been separately revoked. *Id.* at B18-B19.

On the merits of the fraud determination, the court of appeals held that the record supported the agency's determination that petitioners fraudulently obtained their asylee status. Pet. App. B19-B25. The court concluded that the transcript of Berishaj's testimony from Shandorf's criminal trial and petitioners' own testimony before the immigration judge were each sufficient to support the finding of removability based on fraud. *Id.* at B20-B24. The court reiterated the IJ's explanation that "[w]hile the evidence may be insufficient to show [petitioners] bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery." *Id.* at B21 (quoting *id.* at D37-D38) (first brackets in original).

The court also rejected petitioners' claims that the IJ abused his discretion and violated due process by denying their subpoena requests. Pet. App. B25-B27. The court relied on petitioners' failure to comply with 8 C.F.R. 1003.35(b)(2)'s requirement that a subpoena request show that "a diligent effort, without success" had been made to produce the witnesses. Pet. App. B26. The court also noted that the Confrontation Clause of the Sixth Amendment does not apply to removal proceedings. *Id.* at B27.

In an opinion concurring in part and concurring in the judgment, Judge Moore stated that it was unnecessary to address the circuit split on Section 1256(a)'s limitations period because the disagreement in those cases centers on an issue absent here. Pet. App. B28-B30. Judge Moore observed that removability in those cases was based on fraud or error in the adjustment-of-status

process itself, whereas in this case removal is based on fraud in the "entirely separate and distinct" asylum process preceding the adjustment. *Id.* at B29-B30.

ARGUMENT

1. The court of appeals' decision on the applicability of 8 U.S.C. 1256(a)'s five-year limitations period to removal proceedings is correct and consistent with the considered interpretation of that provision by the Attorney General for almost 50 years. That decision (at most) only makes a limited disagreement among the courts of appeals more lopsided in the government's favor. As the separate opinion observes, the facts of this case do not provide an appropriate vehicle for resolving that limited conflict. The Court recently denied a petition for certiorari in a case raising the same issue, and a different result is not warranted here.

a. The court of appeals' decision is correct. The court properly relied on the plain text of 8 U.S.C. 1256(a) to conclude that the five-year time limit on rescission of adjustment of status does not apply to removal proceedings brought on the basis of fraud in the preceding grant of asylum. As the court observed, "[b]y its own terms, [Section] 1256 places a time bar only on the Government's attempt to rescind the status of a lawful permanent resident, and does not apply to removal proceedings." Pet. App. B15; see, *e.g.*, *Kim* v. *Holder*, 560 F.3d 833, 837 (8th Cir.), cert. denied, 130 S. Ct. 393 (2009); *Asika* v. *Ashcroft*, 362 F.3d 264, 269 (4th Cir. 2004), cert. denied, 543 U.S. 1049 (2005). The court further noted that the 1996 amendments to Section 1256(a)—adding in part that "[n]othing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to

remove the alien under section 1229a of this title"—"explicitly allows the Government to initiate removal proceedings * * * without first rescinding the alien's permanent resident status." Pet. App. B15; see *Garcia* v. *Attorney Gen.*, 553 F.3d 724, 729-731 (3d Cir. 2009) (Fuentes, J., dissenting).

The textual distinction between rescission and removal proceedings for purposes of Section 1256(a)'s limitations period is consistent with the evolution of the broader statutory scheme. Before 1952, the relevant statutes prescribed a five-year limitations period within which the Government could initiate deportation proceedings from the time that an alien became deportable. See *Oloteo* v. *INS*, 643 F.2d 679, 682-683 & n.7 (9th Cir. 1981). When Congress enacted the INA in 1952, Congress eliminated any limitations period from the provisions governing deportation proceedings. *Ibid.*; see INA, 8 U.S.C. 1252 (1952). Congress also, however, separately provided for the first time in Section 1256(a) for actions by the Attorney General to rescind an erroneous grant of adjustment of status to an alien, subject to the five-year limitation. *Oloteo*, 643 F.2d at 682-683; see INA § 246(a), 66 Stat. 217. Congress's categorical elimination of a limitations period for deportation proceedings in the INA, while engrafting a more limited one on the newly created rescission procedure, reinforces the court of appeals' reading.

The court of appeals' interpretation avoids strange consequences as well. Petitioner's reading would create the anomalous result that aliens who initially entered the country as nonimmigrants and subsequently adjusted their status while in the United States would be immune from deportation after the lapse of the five-year period, whereas aliens who initially entered the

country as lawful permanent residents would be subject to deportation based on a defect in the initial grant without any time limitation. See *Asika*, 362 F.3d at 271; *In re S-*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

b. The court of appeals was also correct in concluding that, to the extent that there is any ambiguity as to the meaning of 8 U.S.C. 1256(a), the Attorney General's interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. B15. Almost 50 years ago, in 1962, the Attorney General determined that the five- year limitations period for rescission actions did not apply to exclusion or deportation proceedings. See *In re S-*, 9 I. & N. Dec. at 551-557. Since *In re S-*, the Attorney General and the Board have adhered to the same considered view. See, *e.g.*, *In re Belenzo*, 17 I. & N. Dec. 374 (Att'y Gen. 1981); Pet. App. C4. The 1996 amendment, by making clear that rescission is not a prerequisite to removal, confirms and strengthens the Attorney General's interpretation.

In construing Section 1256(a), the Attorney General's 1962 decision acknowledged that the five-year limitations period for rescission actions "may be of little practical value" to many aliens because, even if an alien was insulated from rescission of status after the five-year period, "the same conduct nevertheless [could] be utilized independently as a ground for his deportation or exclusion." *In re S-*, 9 I. & N. Dec. at 555. At the same time, however, the Attorney General recognized the distinction between rescission and removal proceedings and the reason why Congress would have applied the limitations period to the former but the not latter. As the Attorney General explained, the "rescission procedure apparently resulted from congressional recognition that a means more informal and expeditious than depor-

tation was needed to correct mistakes made in granting permanent residence to nonimmigrant aliens through adjustment of status." *Id.* at 555 n.8; see *Asika*, 362 F.3d at 270 ("Under the Act, rescission proceedings are subject to few, if any, procedural protections, *see* 8 U.S.C. § 1256; deportation proceedings, in contrast, are subject to extensive procedural regulations set forth in 8 U.S.C. § 1229a.").

Accordingly, the Attorney General correctly concluded that "the significance which Congress attached to the five-year limitation was that it cut off the availability of a procedure which, although to all intents and purposes would establish deportability, *permitted* the Attorney General to act more informally and expeditiously than he could in a deportation proceeding." *In re S-*, 9 I. & N. Dec. at 555 n.8; see *Asika*, 362 F.2d at 270 ("[S]ection [1256(a)]'s five-year limitation on rescission—even if interpreted to apply only to rescission proceedings—provides an important safeguard to aliens * * * who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal * * * rather than the less procedurally-onerous process of rescission."). Congress's decision to place a five-year limitation on the less formal rescission procedure but not on more protective removal proceedings is thus a reasonable accommodation between protecting an adjusted alien's settled expectations and preventing circumvention of the immigration laws (which may not be discovered, as here, until much later).[4]

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[4] As the Attorney General noted, "while Congress may have *permitted* the Attorney General to make use of more informal procedures

Petitioner contends (Pet. 12-13) that *Chevron* deference is unwarranted because the question presented involves interpretation of a limitations provision and resolution of such questions does not require agency expertise. But Section 1256(a) does not pertain to the time period within which an alien aggrieved by agency action can seek *judicial* review; it instead relates to the time period within which the *agency* itself can carry out its responsibilities under the INA by conducting removal proceedings. See *Asika*, 362 F.2d at 271 n.8 ("The Attorney General's answer to the question presented * * * does not depend on a straightforward interpretation and application of a statute of limitations; rather, it requires the Attorney General to consider whether a five-year statute of limitations would be consistent with the statutory and regulatory framework for deportation, when applied to a few, but not all, of the cases within that framework."). The interpretation of the limitations period in Section 1256(a) thus directly affects the agency's execution of the INA—an issue well within the agency's expertise.

Congress has committed the adjudication of such matters under the INA to the Attorney General (authority that has been transferred in part to the Secretary of DHS), and *Chevron* deference therefore applies. See 8

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in rescission, in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." *In re S-*, 9 I. & N. Dec. at 556 n.8 (citing 8 C.F.R. 246.12(a) and (b) (1962)); see generally 8 C.F.R. Pt. 246. "That the INS has chosen *in its discretion* to provide additional procedural protections to aliens in rescission proceedings reveals nothing about whether Congress relied on the *statutory* disparity in procedures for rescission and removal in enacting section 246(a)." *Asika*, 362 F.3d at 270 n.7.

U.S.C. 1103(a)(1) (2000) ("The Attorney General shall be charged with the administration and enforcement" of the INA, and "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."), amended by Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, § 105(a)(1), 117 Stat. 531 (substituting "Secretary of Homeland Security" for Attorney General in first clause); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to [the INA]."). The Attorney General's reasonable and long-standing interpretation of 8 U.S.C. 1256(a) falls well within the bounds of *Chevron* and thus controls here. Cf. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006) ("[W]hen the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous.").

c. The court of appeals' decision in this case reinforces the majority view against the Third Circuit's outlying interpretation of 8 U.S.C. 1256(a). The Sixth Circuit joined the Fourth, Eighth, and Ninth Circuits in holding that although Section 1256(a) precludes the government from rescinding an alien's permanent resident status more than five years after the date of the alien's adjustment, it does not bar the government from initiating removal proceedings based on the unlawfulness of that adjustment (or, as here, based on fraud in the preceding grant of asylum). See Pet. App. B14; *Kim*, 560 F.3d at 837-838; *Asika*, 362 F.3d at 267-271; *Biggs* v. *INS*, 55 F.3d 1398, 1401 & n.3 (9th Cir. 1995). Only the Third Circuit has held that Section 1256(a)'s five-year limitation on rescission actions applies to removal proceedings. See *Garcia*, 553 F.3d at 727-728; *Bamidele* v. *INS*, 99 F.3d 557, 562-565 (3d Cir. 1996); but see *De*

Guzman v. *Attorney Gen.*, 263 Fed. Appx. 222, 225-226 (3d Cir. 2008) (allowing removal proceedings and distinguishing *Bamidele* on the ground that, unlike in that case, the government did not become aware of the alien's ineligibility for adjustment of status until after the five-year period had lapsed).

Given that the Third Circuit stands alone, both the importance and the intractability of the circuit conflict may depend on whether any other courts of appeals align themselves with the Third Circuit. This Court's intervention would thus be premature. That is especially true in light of the 1996 amendment to Section 1256(a), on which the court below relied in part. Further percolation is appropriate to allow other courts of appeals to adjudicate the issue under the current version of the statute. Indeed, the Court recently denied the petition for a writ of certiorari in *Kim*, *supra*, and there is no reason for a different result here.

In addition, as Judge Moore's separate opinion points out (Pet. App. B28-B30), this case would be a particularly poor vehicle to address the limited circuit conflict. In the prior circuit decisions involving the applicability of Section 1256(a)'s five-year limitation to removal proceedings, removability was based on fraud or error in the adjustment-of-status process itself. *Id.* at B28-B29 (citing cases). By contrast, petitioners' removability in this case is based on fraud in obtaining asylum—a step antecedent to the adjustment of their status to that of lawful permanent resident. The applicability of Section 1256(a)'s time limit to a challenge via removal proceedings to the validity of an alien's adjustment of status is a question distinct from its applicability to such a challenge to an alien's initial grant of asylum. *Id.* at B29-B30; see *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183,

1186 (8th Cir. 2005) (declining to comment on circuit conflict involving Section 1256(a) because removal proceedings in that case were "based on [petitioner's] prior conviction, not on the erroneous grant of permanent residency status"). The Third Circuit itself has endorsed that distinction, so the result in this case presumably would be no different even under its interpretation of Section 1256(a). See *Garcia*, 553 F.3d at 728 (acknowledging Section 1256(a)'s "narrow" time bar as operating "only where deportation is based on an attack on the adjustment itself") (citations omitted); *Bamidele*, 99 F.3d at 564 ("If deportation is predicated on something outside the adjustment, there is no bar.") (citation omitted). This case thus does not directly implicate the existing conflict.

2. Petitioners challenge the IJ's denial of their subpoena requests and contend that the record evidence was insufficient to establish fraud in the grant of asylum. Pet. 17-23. Petitioners fail to identify any conflict between the decision of the court of appeals and any decision of this Court or another court of appeals. In any event, the court of appeals' decision is correct, and these factbound claims do not warrant further review.

Petitioners allege a due process violation by invoking various evidentiary principles applicable in criminal proceedings. Pet. 17-20. But petitioners do not address the governing immigration regulation, 8 C.F.R. 1003.35(b)(2), which requires a subpoena applicant in immigration court "to show affirmatively that he or she has made diligent effort, without success, to produce" the witnesses sought. As the court of appeals determined (Pet. App. B25-B26), petitioners failed to comply with that requirement. Petitioners nowhere dispute that determination—consistent with that of the IJ (*id.* at D6)

and the Board (*id.* at C7)—nor do they challenge the validity of the regulation itself. There is thus no basis for this Court to intervene.

Moreover, even excluding Berishaj's testimony at Shandorf's criminal trial, sufficient record evidence supports the IJ's conclusion that petitioners fraudulently obtained their asylee status. As the court of appeals reiterated, "[w]hile the evidence may be insufficient to show [petitioners] bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery." Pet. App. B21 (quoting *id.* at D37-D38) (first brackets in original). Petitioners' inconsistent and implausible testimony regarding their asylum applications, in addition to the documentary evidence, at least establishes their fraudulent conduct, if not more. See *id.* at B21-B22 ("[T]he IJ properly found that 'the Government also established [petitioners'] fraud through [petitioners'] own testimony.'") (quoting *id.* at D30).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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